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Chinese 'Case Law' in Comparative Law Studies: Illusions and Complexities

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Abstract
Chinese court cases have attained increasing importance in recent studies of Chinese law, but remain insufficiently understood. In this article, I demonstrate why Chinese court cases should be given more weighty consideration in comparative studies involving Chinese law as a comparator, and how such cases, particularly 'Guiding Cases' and 'Gazette Cases' (which are published in the official Gazette of the Supreme People's Court), should be properly dealt with and assessed in view of the complexity of the court case system in China.

The law of the People's Republic of China (PRC) assumes increasing global importance today. However, it is not a major feature on the world map of comparative law research. One of the reasons is that a vast body of court decisions is often overlooked, given inadequate attention, or dealt with in a manner characterized by unproved assumptions and biases. This article shows that a meaningful comparative study involving Chinese law as a comparator should not stop at describing the law on the books, but should consider court decisions as an important source of the 'law in action' in China. In doing so, a properly constructed study should evaluate the significance of court decisions in light of the complexity of the context in which they arise, namely the court case system in China. To facilitate such studies, this article offers an evaluation of the legal significance of two categories of cases that can be said to be the closest that Chinese law has to precedents: cases published in the official Gazette (GSPC) of the Supreme People's Court (SPC) and thus bearing implicit recognition by the Court; and a newly-established, gradually growing body of 'Guiding Cases' that are explicitly given some legal force by the SPC. In respect of the latter category, this paper will also explore, through detailed analysis of a Guiding Case,

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how the Chinese courts' approach to the distillation of norms from concrete cases differs from that normally employed to create precedents in common law jurisdictions.

I. JUDGE-MADE LAW IN CHINA AND LAW IN ACTION

Chinese law is often conveniently regarded as a civil law jurisdiction in that the law is primarily to be found in legislation, and judicial opinions expressed by courts in their adjudication of actual cases are not recognized as a formal source of law.[1] However, those who look solely to Chinese legislation for a solution to a practical problem would most likely be disappointed. What they would find may merely be the law on paper that neither responds to the problem nor is actually relied upon in practice. Unfortunately, Chinese legislation is often characterized by (and duly criticized for) its detachment from the reality of local circumstances as well as its tendency towards statements of broad principles that do not offer any direct solution to a practical problem.[2]

While judges contribute to the consultation process leading to the enactment of major pieces of legislation,[3] this does not alter the fact that most legislative provisions are 'inoperable', namely incapable of direct application to a specific dispute. One reason for this may be the superficial 'transplantation' of statements of legal rules from Western (including common law) jurisdictions. Stripped of their 'social, and above all political, context', such statements are no more than empty shells and cannot advance genuine legal reforms in the receiving jurisdiction.[4] Therefore, what appears to be a course of convergence with the common law[5] might conceal fundamental differences

1. See eg Albert Chen, *An Introduction to the Legal System of the People's Republic of China* (4th edn, LexisNexis Butterworths 2011) 123, 166–67.

2. See eg Fan Yu, 'Xin falü xianshi zhuyi de boxing yu dangdai zhongguo faxue fansi (新法律现实主义的勃兴与当代中国法学反思) [The Rise of New Legal Realism and Reflections on Contemporary Legal Research in China]' [2006] No 4 Zhongguo Faxue (中国法学) [China Legal Science] 38, 46–48.

3. Mr Hu Kangsheng, Deputy Director of the Legislative Committee of the National People's Congress Standing Committee (NPCSC), for example, stated in his explanatory speech to the enactment of the 1999 Contract Law that judicial interpretations implemented for over a decade and tested foreign experiences in dealing with new issues arising in China's judicial practice should be considered for adoption: Civil Law Office of the NPCSC Legal Work Commission (ed), *Zhonghua renmin gongheguo hetongfa lifa ziliaoxuan* (中华人民共和国合同法立法资料选) [*Selected Legislative Materials on the Contract Law of the PRC*] (Falü chuban she (法律出版社) [Law Press] 1999) 4. Also, judges' experiences in deciding cases may be given greater importance in untrodden areas of law, such as 'liability for fault in contract negotiation' (also known as '*culpa in contrahendo*'): ibid 138–39, 183–86; areas in which judges have developed expertise or knowledge (see eg specific provisions on hire purchase contracts in Ch 14 of the Chinese Contract Law (CCL), which drew upon Zuigao renmin fayuan yingfa guanyu shenli rongzi zulin hetong jiufeng anjian ruogan wenti de guiding de tongzhi (最高人民法院印发《关于审理融资租赁合同纠纷案件若干问题的规定》的通知) [SPC Notice on the Issuance of 'Provisions on Certain Issues Concerning the Trial of Hire Purchase Contract Disputes'] (SPC 法发 [1996]19号, approved by the SPCJC, promulgated, and effective as of 27 May 1996), repealed by SPC 法释[2014]3号, effective from 1 March 2014; and where judicial statistics are available (for example, it was suggested that formal requirements on contracting should be relaxed given that around thirty-five per cent of contract cases decided by the People's Courts involved oral contracts).

4. O Kahn Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1, 8, 27.

5. John H Matheson, 'Convergence, Culture and Contract Law in China' (2006) 15 Minnesota Journal of International Law 329, 334.

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that will surface only when the borrowed rules, principles, or notions are evaluated in their practical use.

Another explanation for the indifference of Chinese legislation to concrete problems is that the legislators intentionally adopted vague provisions to provide an overarching framework under which differing solutions can be developed to suit a variety of local situations. If so, the legislation is no more than a starting point for an exploration of the 'law in action'; it would, therefore, be an entirely artificial enterprise to restrict one's study to the 'law in books'. Similarly, it is rarely the case that legal research in China sets out to offer solutions to practical problems.[6] It is not surprising that Chinese legal researchers and judges (and practising lawyers) appear to be doing radically different things in their respective work, and most Chinese law review articles are concerned with theoretical discussions of legislative provisions. This provides an interesting contrast to legal scholarship in Western (particularly common law) jurisdictions, where it may be persuasive in judicial reasoning.[7]

It thus makes sense for a comparatist to focus on how legislative provisions are applied and interpreted in tune with 'the conditions of Chinese life'.[8] This requires going beyond the law as written to investigate the 'law in action' in China including its longstanding connection with policy.[9] One important and foundational step is to see how a legal solution to a problem is formulated and put to work in the courtroom. In this context, the term 'law in action' is used in a broad sense to capture the extension of research into law beyond the plain language of written law – the 'law in books' – particularly judicial applications of law.[10] Two general points may be made in connection with the methodology to be adopted.

First, Chinese court cases should be understood and examined on their own terms. Standing in the shoes of an internal legal actor, the comparatist must describe not only factors objectively affecting the solution, but also all 'formal legal arguments' that the actor subjectively believes are relevant to its operation.[11] When necessary, they must be able to move back and forth between the internal and external perspectives, in both

6. See eg Zhenglai Deng, 'Zhongguo faxue xiang hechu qu (zhong) – jiangou "zhonguo falü lixiang tujing" shidai de lungang (中国法学向何处去(中) – 建构 "中国法律理想图景"时代的论纲) [Jurisprudence of China: Where to go? (II) – Research Sketch of Building an Era of China's Legal Ambition Prospect]' (2005) 23(1) Zhengfa Luntan (政法论坛) [Tribune of Political Science and Law] 25, 37–41 (Chinese legal research paid little attention to consumers' vulnerability to widespread counterfeit goods particularly food and medicine). See also Gu Peidong, 'Yelun zhongguo faxue xiang hechu qu (也论中国法学向何处去) [Another View on Where Chinese Legal Science is Heading]' [2009] No 1 Zhongguo Faxue (中国法学) [China Legal Science] 5, 8.

7. See eg Stephen Waddams, 'The Authority of Treatises in English law (1800–1936)' in Mark Godfrey (ed), *Law and Authority in British Legal History, 1200–1900* (CUP 2016) 274–75.

8. Roscoe Pound, 'Comparative Law and History as Bases for Chinese Law' (1948) 61 Harvard Law Review 749, 759.

9. Stanley B Lubman, *Bird in a Cage: Legal Reform in China after Mao* (Stanford University Press 2000) 35–36. See also Stanley Lubman, 'Studying Contemporary Chinese Law: Limits, Possibilities and Strategy' (1991) 39 American Journal Comparative Law 293, 330–31.

10. Jean-Louis Halpérin, 'Law in Books and Law in Action: The Problem of Legal Change' (2011) 64 Maine Law Review 45, 65–68.

11. Catherine Valcke, 'Reflections on Comparative Law Methodology – Getting Inside Contract Law' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (CUP 2012) 22, 25, 29, 34–37, 42–43.

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formulating a common problem and setting up an analytical framework and corresponding strategies.[12] But care must be taken when using labels or categories borrowed from Western systems as they might 'not [be] standardized across legal systems but rather determined locally'.[13] It is important to acknowledge that the differences between Chinese law and, say, German or English law are more fundamental than appears at first glance, and that no presumption of similarity should automatically apply.

The role of law in society has traditionally been viewed differently in China and such differences are reflected, inter alia, in the following aspects. The Chinese legal system is still in transition[14] and we need to accept that many facets of that system remain in flux, and a range of possibilities may exist in respect of the interpretation of Chinese law. The values of legal certainty, stability, and predictability are highly prized in Western legal traditions, but do not carry as much weight in China due to a different attitude toward change.[15] Inevitably, a Chinese lawyer would probably disagree with a common law lawyer on the extent to which the state may interfere with or impose regulations over party autonomy.[16] For example, Chinese law takes a unique stance on matters such as the availability of court-administered contract adaptation, reflecting a demonstrably different balance struck between the principle of *pacta sunt servanda* and that of substantive fairness.[17] While it is no longer accurate to claim that Chinese law 'remains a Soviet law system',[18] certain traits of the former Soviet law have left lasting marks on today's Chinese law[19] and a discrete inquiry is required into questions such as the role and elusive weight of party policies in judicial adjudication of individual cases, and the extent to which judges perform paternalistic intervention into matters of a private nature. Recognizing these fundamental differences will guard against blind application of assumptions derived elsewhere to China,[20] and offer an antidote to uncritical faith in Western, including common law, doctrines.[21] Of course, this is not to suggest that a comparative study involving Chinese law is all about identifying differences; it is a matter of equal importance, in

12. ibid 28–29.
13. ibid 31.
14. Jianfu Chen, *Chinese Law: Context and Transformation* (Martinus Nijhoff 2008) 2, 694.
15. See eg Victor H Li, *Law Without Lawyers: A Comparative View of Law in China and the United States* (Westview Press 1978) 3–4.
16. Donald C Clarke, 'Puzzling Observations in Chinese Law: When is a Riddle Just a Mistake?' in C Stephen Hsu (ed), *Understanding China's Legal System: Essays in Honor of Jerome A Cohen* (NYU Press 2003) 93, 102–103. cf generally with Hugh Collins, *Regulating Contracts* (OUP 1999).
17. cf Ewould Hondius and Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2014) 11. See also Patricia Pattison and Daniel Herron, 'Mountains are High and Emperor is Far Away: Sanctity of Contract in China' (2003) 40(3) American Business Law Journal 459, 462–63.
18. cf Roderick O'Brien, 'Comparative Law and China's Socialist Legal System' [2014] Journal of South African Law 130, 139.
19. Harold J Berman, 'Soviet Perspectives on Chinese Law' in Jerome Alan Cohen (ed), *Contemporary Chinese Law: Research Problems and Perspectives* (Harvard University Press 1970) 313, 316–17.
20. Stanley Lubman, 'Studying Contemporary Chinese Law: Limits, Possibilities and Strategy' (1991) 39 (2) American Journal of Comparative Law 293, 294, 317.
21. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 21–22.

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the interest of promoting mutual understanding and cooperation, to identify similarities, particularly those achieved through international unifying laws such as the *Vienna Convention on the Law of Treaties* and the *UNIDROIT Principles of International Commercial Contracts*.[22]

Second, Chinese law should not be taken at face value. I have noted that there might be a significant gap between the 'law in books' and the 'law in action'. A comparatist might be perplexed by the discrepancies between law and practice. In most cases, this is attributable to the ambiguity of the law itself. Although judge-made law is by its nature intended to be immediately applicable and to be dispositive in the resolution of a specific dispute, this does not mean that all considerations factored into the court's reasoning are made explicit. The reality is quite to the contrary: the jurisprudential basis of most judge-made laws in China remains opaque, inexplicit, and unexplored. The line of reasoning that Chinese judges pursue in reaching their decisions is often vaguely expressed or undisclosed, and in need of systematization. Compared to court decisions in common law systems, there are limited materials available from which credible conclusions about the court's intentions and actions can be made.

It is thus very much up to the individual comparatist to make his or her best effort at making sense of the court's decision, using all accessible sources including judges' extrajudicial writings, interviews, and judicial conferences, as well as official documents and judgments. In this process, one may resort to non-legal factors to explain the decision. The methodology to be employed is best seen as a 'new doctrinalism' under which the comparatist is constantly aware of assumptions, structures, and conventions imposed by a legal doctrine, always striving to understand and apply the legal doctrine in a non-mechanical manner, and taking advantage of a full range of factors (whether legal or not) relevant to the solution of the problem at hand.[23] It is apparent from their judgments and other supporting materials that the law-applying and law-making activities of Chinese judges are undoubtedly doctrinal in nature. The days of substituting a political decision for a judicial one are gone, and formal legal arguments have generally become the paradigm in China's courtrooms. Nevertheless, non-legal factors still have an unmistakable presence in the judicial process. For example, the administrative rank of a court or judge may affect the weight given to their decision.[24] However, this article is concerned with the Poundist sense

22. E Allan Farnsworth, 'Comparative Contract Law' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (OUP 2006) 904.

23. Shyamkrishna Balganesh, 'The Constraint of Legal Doctrine' (2015) 163(7) University of Pennsylvania Law Review 1843, 1845, 1847–50, 1856–57. For the effect of legal doctrine in shaping (mis)perceptions about the law of contract, see Tess Wilkinson-Ryan, 'Intuitive Formalism in Contract' (2015) 163(7) University of Pennsylvania Law Review 2109, 2131, 2135. See also Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Columbia Law Review 605.

24. See eg Weixia Gu, 'The Judiciary in Economic and Political Transformation: *Quo Vadis* Chinese Courts?' (2013) 1(2) Chinese Journal of Comparative Law 303, 325–26 (on the importance of judges' administrative ranks to their decision-making); Mavis Chng and Michael W Dowdle, 'The Chinese Debate about the Adjudication Committee: Implications for What "Judicial Independence" Means in the Context of China' (2014) 2 Chinese Journal of Comparative Law 233, 244 (on the decisions of adjudicative committees, which are usually accorded with the greatest authority).

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of 'law in action', focusing on the use of judge-made law in judicial adjudication of disputes, rather than (despite its undisputed significance) the role of 'living law' in resolving disputes through other channels.[25] The task of a comparatist is to discover Chinese judges' 'situation sense'[26] in deciding cases by taking into account all contextual factors relevant to the judicial decision under investigation.

In approaching a Chinese case, to what extent should the analytical method used in the common law be employed to extract a *ratio decidendi* from the case? How far might a Chinese case help us to identify the solution adopted under the legal system to a given problem? Should the study be confined to a textual analysis or should a broader inquiry be made into the surrounding socioeconomic and political circumstances? To (at least partially) answer these questions, I first assess the current legal status of cases as a whole, using cases published in the GSPC, the SPC's official journal, as the paradigm, and then explore the newly-established system of Guiding Cases, focusing on the intricacies of extracting legal principles or rules from them.

II. APPROACHING JUDICIAL CASES IN CHINA: AN OVERVIEW

The current legal status of cases, or court decisions, in China is rather difficult to ascertain, but the prospect of developing a system of case law in the foreseeable future seems promising. In recent years, the SPC has campaigned hard for greater prominence for court decisions at all levels. For example, the latest Fourth Five-Year Plan issued by the SPC features an 'open trial' policy that aims to promote transparency and fairness and to instil public trust in court adjudication.[27] Two streamlined attempts to implement this policy deserve special attention.

First, considerable progress has been made in enhancing legal reasoning in court judgments. In the SPC's first Five-Year Outline Plan for Reform,[28] the enhancement and publication (online or in print) of the 'Reasons of Adjudication' (ie, grounds of decision) is considered to be a major reform measure aimed at improving the quality of court judgments. It was intended that this measure would enable litigants to better understand why court adjudication is just and fair, and would help to improve judges'

25. David Nelken, 'Law in Action or Living Law? Back to the Beginning in Sociology of Law' (1984) 4 Legal Studies 157. In the latter type of study, an empirical investigation focusing on non-legal factors is often required: Stewart Macaulay, 'The New versus the Old Legal Realism: "Things Ain't What They Used to Be"' [2005] Wisconsin Law Review 365, 387–88, 390, 395–96.

26. Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co 1960) 5. See also William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld and Nicolson 1973) 225.

27. Zuigao renmin fayuan guanyu quanmian shenhua renmin fayuan gaige de yijian – renmin fayuan disige wunian gaige gangyao (2014–2018) (最高人民法院关于全面深化人民法院改革的意见–人民法院第四个五年改革纲要 (2014–2018)) [Opinions Concerning Comprehensive Deepening of Reform on People's Courts: the Fourth Five-Year Outline Plan for Reform (2014-2018)] (SPC 法发[2015]3号, issued and effective as of 4 February 2015), pt 5.

28. Renmin fayuan wunian gaige gangyao (人民法院五年改革纲要) [Five-Year Outline Plan for Reform of the People's Courts] (SPC 法发[1999]28号, issued on 20 October 1999), art 13, in Zuigao Renmin Fayuan Gongbao (最高人民法院公报) [GSPC], 1999, Issue 6, 185–90 <http://gongbao.court.gov.cn/Details/2557d0b4c78959398ac5df959537f9.html> accessed 10 December 2018.

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skills in writing judgments.[29] The SPC further provides that court judgments that fail to explain the 'Reasons of Adjudication' or contain obvious defects or errors are unsuited for publication.[30] With notable improvements in this regard in the more recent cases, the emphasis at the next stage of reforms will be placed on: (1) further enhancing legal reasoning in appellate and retrial decisions, and controversial, complex, and socially influential first-instance decisions; (2) encouraging more attention to be given to counsel's arguments, with the court's reasons for not accepting counsel's arguments to be clearly stated in the judgment; and (3) establishing proper standards for assessing the quality of legal reasoning and factoring the results in the promotion and selection process of judges.[31]

Second, according to the Fourth Five-Year Plan, all judgments handed down by all four levels of courts (namely the SPC, High People's Courts (HPC), Intermediate People's Courts (IPC), and Basic People's Courts (BPC)) are in principle to be published on a unified online platform, and only in defined exceptional cases is a judgment exempted from this requirement.[32] In 2016, the SPC designated the 'China Judgments Online' (CJO) website as the official platform for publishing court judgments.[33] All judgments except those involving state secrets or privacy issues, or resulting from mediation shall be published on the CJO website within seven working days of taking effect.[34] Aside from technical edits, a judgment published on the website shall be identical to the original judgment.[35] In an earlier document, the SPC had provided for three other channels of publishing its own judgments in addition to official websites: (1) the *People's Daily* or *Law Daily* for influential cases; (2) the *People's Court Daily*, the GSPC or both for paradigmatic cases with some guiding function; and (3) annually published collections of cases.[36] With the proliferation of published cases – the number of judgments available on the CJO website is astronomical – the increasing challenge for a comparatist studying Chinese court cases is the practical difficulty in reading every searchable case. A possible approach is to conduct an empirical survey to ascertain the number of cases supporting one or another position. While this might demonstrate the range of different positions in existing decisions, it does little to predict how the controversy is likely to be resolved in a future case. Cases supporting a certain position might have varying degrees of persuasiveness, and mere

29. Mingshan Zhu, Guanyu 'Renmin fayuan wunian gaige gangyao' de shuoming (关于《人民法院五年改革纲要》的说明) [Official Explanatory Notes to Five-Year Outline Plan for Reform], in Zuigao Renmin Fayuan Gongbao (最高人民法院公报) [GSPC] (n 28) 190–96.

30. Zuigao renmin fayuan caipan wenshu gongbu guanli banfa (最高人民法院裁判文书公布管理办法) [SPC Regulatory Measures on the Release of Judgments] (SPC 法办发[2000]4号, issued and effective as of 15 June 2000), art 4(5)–(6).

31. Fourth Five-Year Outline Plan (n 27), art 34.

32. Fourth Five-Year Outline Plan (n 27), art 39.

33. Zuigao renmin fayuan guanyu renmin fayuan zai hulianwang gongbu caipan wenshu de guiding (最高人民法院关于人民法院在互联网公布裁判文书的规定) [SPC Provisions on the Release of Judgments on the Internet by People's Courts] (SPC 法释[2016]19号, approved by the SPCJC on 25 July 2016, promulgated on 29 August 2016, effective from 1 October 2016), art 2.

34. ibid, arts 4 and 7. In practice, not all judgments are released on the website; it is estimated that about seventy per cent of all judgments delivered since the launch of the website are released there.

35. ibid, art 15.

36. SPC Regulatory Measures (n 30), art 2.

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numbers cannot in and of itself be determinative of the normativity of a particular position.

Given increased publicity and enhanced judicial reasoning, one might plausibly claim that China is developing a system of case law. However, the question that remains to be answered is: what is the weight that should be given to an individual case in China? In other words, how likely is a court decision, including its reasoning, to be accepted and followed by other courts? It is sensible to start with the category of published cases most likely to be treated in a precedent-like way, that is, cases published in the GSPC (Gazette Cases) since 1985.[37] A recent survey in Sichuan Province shows that the GSPC is regarded by judges and practicing lawyers alike as a publication with the greatest influence on their case work.[38] The fact that cases are published in the GSPC along with legally binding materials such as Judicial Interpretations creates an appearance of authoritativeness. But are they truly 'authorities' binding upon lower courts?

Gazette Cases are said to be 'an important means through which the Supreme People's Court provides guidance to lower courts with regard to their adjudicative work'.[39] 'Guidance' may be given by various means. The SPC provides guidance on adjudicative work to lower courts through a variety of means, including conducting trials that are supposed to be exemplary, issuing Judicial Interpretations, Guiding Cases or other rule-making documents, holding professional meetings, and training judges from lower courts.[40] Not all such means of guidance can be understood to carry legal binding force. Thus, 'softer' words (*cankao* or *jiejian*) emphasizing the role of a Gazette Case as a reference for deciding cases have been used. It is, however, argued that all such words must be understood in their political context and the choice of the word 'guidance' was intended to counter possible questions as to the

37. All Gazette Cases are available at the official website of the GSPC at <http://gongbao.court.gov.cn/>.

38. Weimin Zuo and Mingguo Chen (eds), *Zhongguo tese anli zhidao zhidu yanjiu* (中国特色案例指导制度研究) [*Studies on the Guiding Case System with Chinese Characteristics*] (Peking University Press 2014) 50. Two other publications, the Applied Law Institute of the SPC (ed), *Renmin fayuan anli xuan* (人民法院案例选) [*Selected Cases of People's Courts*] (People's Court Press, various years), and the National Judges College and the School of Law of Renmin University of China (eds), *Zhongguo shenpan anli yaolan* (中国审判案例要览) [*Collection of Cases in China*] (Renmin University Press, various years), are also regarded as influential. Other significant publications include the People's Court Daily newspaper and the Case Guidance journal edited by the Sichuan HPC.

39. Editorial Department, 'Chuban shuoming (出版说明) [Introductory Note]' in *Zhonghua renmin gongheguo zuigao renmin fayuan gongbao quanji* (中华人民共和国最高人民法院公报全集) [*Complete Collection of the Gazette of the SPC of the PRC*] (People's Court Press 1995), cited in Chen (n 1) 167. See also Yang Xiao, 'Quanmian tuijin renmin fayuan de gexiang gongzuo wei gaige, fazhan, wending tigong youli de sifa baozhang (全面推进人民法院的各项工作为改革、发展、稳定提供有力的司法保障) [Comprehensive Promotion of Various Aspects of the Work of the People's Courts so as to Provide Effective Legal Guarantees for Reform, Development, and Stability]' (Speech to the National Conference of Presidents of Higher People's Courts, 2 December 1998), GSPC, 1999, Issue 1, 3 <http://gongbao.court.gov.cn/Details/ad6ed9e6304eaa96b31c2057bb034f.html> accessed 10 December 2018.

40. Guanyu guifan shangxiaji renmin fayuan shenpan yewu guanxi de ruogan yijian (关于规范上下级人民法院审判业务关系的若干意见) [Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels] (SPC 法发[2010]61号, issued and effective as of 28 December 2010), art 8.

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SPC's constitutional power to create binding precedents as well as to alleviate the concerns of other state organs.[41]

Unfortunately, the SPC's true intention has never been made clear. The Gazette Cases are sorted into two categories: 'cases' (*anli*) are submitted by lower courts and approved and rewritten or edited by the SPC, whilst 'selected judgments' (published since the GSPC's Issue 2 of 2003) comprise 'exemplary' original decisions made by the SPC itself. Since the GSPC's Issue 9 of 2005, published cases in both categories have been prefaced with a paragraph of 'Essential Points of Adjudication' (Essential Points), which seems to be the part of the judgment designed to provide the necessary 'guidance'.[42] But the SPC has not spelt out the legal effect of such 'Essential Points'. The persuasiveness of Gazette Cases is further weakened by the fact that the selection of cases by the SPC is often driven by the financial or political (as opposed to legal) significance of a case, and that since GSPC's Issue 12 of 1999, Gazette Cases have ceased to be submitted to the SPC's Judicial Committee (SPCJC) for discussion or approval. At any rate, the reception of Gazette Cases by the lower courts is just as important as the SPC's intention. Although lower courts are not allowed to cite Gazette Cases directly in their judgments, such cases may feature in the trial report prepared by the presiding trial judge and be considered and discussed in the internal deliberation process leading up to the final judgment. In practice, some judgments have also adopted the legal reasoning in a Gazette Case albeit without referring expressly to that case.[43] The frequency with which such an 'implicit reference' is made to a Gazette Case has yet to be ascertained empirically. However, given the limited number and accessibility of Gazette Cases (totalling less than 1,000 at present), it would not be surprising that lower courts resort to such cases only sparingly, and in a random and unsystematic manner.[44] After all, Gazette Cases are generally seen by lower courts as something that are in themselves non-binding and merely serve as an aid in deciding similar cases, unless the SPC, on rare occasions, unequivocally requires lower courts to follow the rule established in specific Gazette Cases.[45]

41. Nanping Liu, '"Legal Precedent" with Chinese Characteristics: Published Cases in the Gazette of the Supreme People's Court' (1991) 5(1) Journal of Chinese Law 107.

42. Xiaoming Xi and the Second Civil Court of the SPC (eds), *Zuigao renmin fayuan guanyu maimai hetong sifa jieshi lijie yu shiyong* (最高人民法院关于买卖合同司法解释理解与适用) [*Understanding and Applying SPC Interpretations on Sales Contracts: Texts, Interpretations, Reasons and Cases*] (People's Court Press 2012) 4.

43. When one reads Chinese court judgments, it is not uncommon for the paragraph laying out the court's reasoning in an influential case (including but not limited to Gazette Cases) to be directly replicated or adapted with some minor differences in subsequent cases with similar facts decided by other courts (particularly those on a lower level in the hierarchy than the court deciding the prior case).

44. Mingguo Chen and Weimin Zuo, 'Zhidao xinganli de yingyong zhangai ji kefu—sichuan fayuan anli yingyong shidian gongzuo de chubufenxi (指导性案例的应用障碍及克服—四川法院案例应用试点工作的初步分析) [Obstacles in the Application of Guiding Cases and Overcoming Them: A Preliminary Analysis of Case Application in Sichuan Courts]' [2012] No 5 Falü Shiyong (法律适用) [Journal of Law Application] 67, 69–70.

45. Guangzhong Chen and Zhengquan Xie, 'Guanyu woguo jianli panli zhidu de sikao (关于我国建立判例制度问题的思考) [Reflections on the Question of Establishing a Judicial Precedent System in Our Country]' [1989] No 2 Zhongguo Faxue (中国法学) [China Legal Science] 86, 90.

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The most remarkable example that supports this view is perhaps the Huang Muxing case,[46] where a lender applied for a retrial of an appellate decision previously delivered by the SPC, alleging that the SPC failed to follow a prior Gazette Case.[47] The lender argued that the SPC should have followed the Gazette Case by declaring the disputed loan contract valid, and should have allowed civil proceedings to proceed despite the fact that one of the borrowers had been charged and prosecuted in separate criminal proceedings for taking out the loan. The SPC rejected the lender's application and stated that:

> the Gazette Case cited by Huang Muxing is not a Guiding Case issued in accordance with our court's Provisions Concerning Case Guidance Work, therefore his claim that the present case should be dealt with by reference to the Gazette Case is without foundation.[48]

Notably, the SPC rejected the application without exploring whether the 'essential points of adjudication' outlined in the Gazette Case might have applied to the facts of the present case.[49] The failure to refer to the case in the appellate decision was held not to constitute an error of law and hence the lender was denied a retrial of the case.

By contrast, there are circumstances in which it might be hard to justify disregard for a prior court decision. We have seen above that Gazette Cases are not necessarily binding unless they are also Guiding Cases. Might non-Guiding Cases published in the GSPC be given a stronger legal effect than non-Guiding Cases not published in the GSPC? At this juncture, it is only possible to make some general preliminary observations. First, the influence of a case and the regard likely to be given to it by another court depends on a combination of complex factors, and should be assessed on a case-by-case basis. Sometimes the answer hinges on the potential influence on a specific court. Prior decisions of a superior court immediately above in the hierarchy, particularly those concerning appeals from decisions of the lower court in question, may be most influential on that lower court even if they are not published in the GSPC.[50] Second, being published in the GSPC implies that the case is recognized (albeit no longer formally approved by the SPCJC) and edited by the SPC to be easily accessible. This satisfies the minimal standards for a case to be properly regarded as a binding or at least influential precedent, namely accessibility and reasonable quality in

46. Li yidong deng yu huang muxing yiban jiekuan hetong jiufen shengqing zaishenan (李艺东等与黄木兴一般借款合同纠纷申请再审案) [Li Yidong et al v Huang Muxing] (2014) 民申字第 441 号 (SPC, 4 June 2014).

47. Wu guojun su chen xiaofu, wang kexiang ji deqingxian zhongjian fangdichan kaifa youxian gongsi minjian jiedai, danbao hetong jiufen an (吴国军诉陈晓富、王克祥及德清县中建房地产开发有限公司民间借贷、担保合同纠纷案) [Wu Guojun v Chen Xiaofu] (Huzhou IPC, Appellate Decision, 2 August 2010), GSPC, 2011, Issue 11.

48. ibid.

49. ibid.

50. Chen (n 1) 167, citing Bu Dong, *Sifa jieshi lun* (司法解释论) [*Judicial Interpretation*] (Chinese University of Political Science and Law Press 1999) 356–64. See also Chen and Zuo (n 44) 68 (in an experimental survey, the types of cases referred to by the selected IPCs and BPCs in Sichuan Province in trials conducted in a certain period were as follows: prior decisions made by the same court (45.16%); HPC cases (22.58%); SPC cases (14.52%)). Note that a HPC may provide guidance to lower courts within the same hierarchy in the province or autonomous prefecture by issuing 'Referential Cases' (*cankaoxing anli*): see Several Opinions on Regulating the Trial Work Relations between the People's Courts at Different Levels (n 40), art 9.

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legal reasoning and judgment-writing. Whether the decision in the case must come from a court ranked high in the hierarchy (such as IPC and above) is debatable.

Third, although a Gazette Case is not by itself binding, it can acquire binding force or at least greater influence if it has been effectively followed on a number of occasions. A line of well-published cases may develop and reinforce a common principle, rule, or point of law so that they strengthen each other's authority and persuasiveness. For example, a decision of the SPC in 2000 had a devastating effect on the banking industry in China as a vast number of security or surety contracts entered into by banks were declared invalid on the ground that the security was created by the board of directors over company assets in favour of some of the shareholders.[51] In a series of Gazette Cases, the SPC clearly steered away from this problematic position, holding that such contracts are valid and enforceable insofar as the third party has duly examined the relevant documents.[52] The subsequent line of cases thus established a clear rule to be followed in future cases.

Fourth, while in most of the Gazette Cases, the 'Essential Points' are no more than a reiteration of existing legal rules,[53] there is an increasing number of Gazette Cases[54] that create new rules, fill existing gaps, and settle uncertain points of law. The latter cases constitute more promising references for courts deciding future cases. For example, a Gazette Case clarifying that a contractual clause excluding an employer's liability for industrial injuries is invalid is likely to be treated as law at a time when the legislation is silent on the matter.[55]

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51. Fujian sheng zhongfu shiye gufen youxian gongsi deng yu zhongguo gongshang yinhang fuzhou shi min dou zhihang jiekuan danbao jiufen an (福建省中福实业股份有限公司等与中国工商银行福州市闽都支行借款担保纠纷案) [Fujian Zhongfu Co Ltd v Industrial and Commercial Bank of China Fuzhou Mindu Branch] (2000) 经终字第186号 (SPC, 17 Nov 2001) (a contract by which the board of directors of a company created a security interest in company assets in favour of shareholders was held invalid by the SPC based on art 60(3) of the then-Company Law). The decision put RMB 270 billion worth of bank loans in jeopardy.

52. Zhongguo jinchukou yinghang yu guangcai shiye touzi jituan youxian gongsi, sitong jituan gongsi jiekuan danbao hetong jiufen an (中国进出口银行与光彩事业投资集团有限公司、四通集团公司借款担保合同纠纷案) [China Import and Export Bank v Guangcai Investment Co Ltd] (2006) 民二终字第49号 (SPC, 15 May 2006), GSPC, 2006, Issue 7; after amendments, art 16(1)–(2) of the current Company Law subjects a security contract to strict approval procedures within the company: Zhong jiancai jituan jinchukou gongsi su beijing dadi hengtong jingmao youxian gongsi deng jinchukou daili hetong jiufen shangsu an (中建材集团进出口公司诉北京大地恒通经贸有限公司等进出口代理合同纠纷上诉案) [China National Building Materials Import & Export Group Co v Beijing Lang & Overseas Trading Co Ltd] (2011) (Beijing HPC, 22 Sept 2009), GSPC, 2011, Issue 2; Zhaoshang yinhang gufen youxian gongsi dayuan donggang zhihang yu dalian zhengbang futu liao gufen youxian gongsi den jiekuan hetong jiufen an (招商银行股份有限公司大远东港支行与大连振邦氟涂料股份有限公司等借款合同纠纷案) [Dalian Donggang Sub-Branch of China Merchants Bank Co Ltd v Dalian Zebon Fluorocarbon Paint Stock Co Ltd], (2012) 民提字第 156 号 (SPC, 22 April 2014), GSPC, 2015, Issue 2.

53. Chen and Zuo (n 44) 54 (reporting, based on survey findings, that this was the case in 86% of all Gazette Cases, and only 11% of Gazette Cases dealt with new issues not covered by existing law).

54. Wang Qin, 'Lun woguo anli zhidao zhidu de goujian he shiyong fangfa: yi zuigao renmin fayuan gongbao wei fenxi yangben (论我国案例指导制度的构建和适用方法—以《最高人民法院公报》为分析样本) [On the Establishment and Methods of Application of the Chinese Guiding Cases System — Taking the SPC Gazette as a Sample]' [2007] No 4 Falü Fangfa yu Falü Siwei (法律方法与法律思维) [Legal Methodology and Legal Thinking] 205, 217.

55. Zhang lianqi, zhang guoli su zhang xuezhen sunhai peichang jiufen an (张连起、张国莉诉张学珍损害赔偿纠纷案) [Zhang Lianqi and Zhang Guoli v Zhang Xuezhen] (1989) (Tanggu District People's Court, 24 December 1988), GSPC, 1989, Issue 1.

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Finally, in early 2017, the SPC established a system that makes it harder for the SPC to depart from or ignore its own prior decisions.[56] Under this system, the adjudicating judge is required to compile a report covering all similar or related cases decided or being decided by the SPC. Where the outcome of adjudication differs from the standard adopted in such prior cases, creates a new standard, or where such prior cases adopt different standards, the case must be considered by both a divisional meeting of expert judges and the SPCJC before a judgment is rendered. This system will afford all SPC judgments, not merely those published in the GSPC, with a greater degree of authority.

In sum, the conclusion that a case has a general legal effect should be drawn with utmost care and on the basis of an assessment of the particular circumstances of the case. At present, such cases are likely to be small in number. In fact, it is perhaps more prudent to say that cases, even those published in the GSPC, are not per se binding. Apparently, by reason of the SPC's implicit recognition, Gazette Cases are likely to wield greater influence on some judges' minds than other cases, but this is hardly decisive. There are cases published elsewhere acquiring a similar or even higher level of influence owing to other factors. Next, we turn to examine one specific type of cases that are given formal legal effect, namely the Guiding Cases issued by the SPC.

III. A GUIDING CASE AT WORK

The Guiding Case System was formally established by the SPC pursuant to its *Provisions on Case Guidance* on 26 November 2010,[57] and it has been the subject of considerable scholarly comment both in China and overseas.[58] Guiding Cases are legally effective court judgments approved by the SPCJC following a set procedure of recommendation, selection, compilation, review, and publication in a specific,

56. See Zuigao renmin fayuan sifa zeren zhi shishi yijian (shixing) (最高人民法院司法责任制实施意见(试行)) [SPC Implementation Opinions (Provisional) on the Judicial Responsibility System] (not publicly released, effective from 1 August 2017), arts 39, 40.

57. Guanyu anli zhidao gongzuo de guiding (关于案例指导工作的规定) [Provisions on Case Guidance Work] (法发[2010] 51号). This is supplemented by a subsequently promulgated Zuigao renmin fayuan guanyu anli zhidao gongzuo de guiding shishi xize (《最高人民法院关于案例指导工作的规定》实施细则) [Detailed Rules for the Implementation of the Provisions of the Supreme People's Court on Case Guidance] (法[2015]130号, issued and effective as of 13 May 2015). The power to issue Guiding Cases is also vested in the Supreme People's Procuratorate and the Ministry of Public Security, but it is doubtful that Guiding Cases issued by those two institutions will be as influential.

58. See eg Ping Yu and Seth Gurgel, 'Stare Decisis in China? The Newly Enacted Guiding Case System' in Marco Wan (ed), *Reading the Legal Case: Cross-Currents between Law and the Humanities* (Routledge 2012) 142–58; Mark Jia, 'Chinese Common Law? Guiding Cases and Judicial Reform' (2016) 129(8) Harvard Law Review 2213; Jingting Deng, *Zhidaoxing anli de bijiao yu shizheng* (指导性案例的比较与实证) [*Comparative and Empirical Studies on Guiding Cases*] (Renmin University of China Press 2015); Yulin Fu, 'Jianli panlizhidu de liangge jichuxing wenti–yi minshi sifa de jishu wei shijiao (建立判例制度的两个基础性问题–以民事司法的技术为视角) [Two Basic Issues on the Establishment of a Precedent System – From the Perspective of Civil Judicial Techniques]' [2009] No 1 Huadong Zhengfa Daxue Xuebao (华东政法大学学报) [Journal of East China University of Political Science and Law] 98; Shichun Li, 'Anli zhidao zhidu de lingyitiao silu–sifa nengdong zhuyi zai zhongguo de youxian shiyong (案例指导制度的另一条思路司法能动主义在中国的有限适用) [An Alternative Look at the Guiding Cases System – The Limited Application of Judicial Activism in China]' [2009] No 6 Faxue (法学) [Law Science] 59.

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highly-edited form.[59] While the title indicates a 'guiding' effect on future trials, Guiding Cases are given a more clearly defined effect, as the SPC states that 'People's Courts of all levels shall *canzhao* [Guiding Cases] when deciding like cases'.

The word '*canzhao*' has caused considerable confusion as the new system of Guiding Cases would be pointless if '*canzhao*' were to be confined to the old sense of 'refer to', which implies a duty only to consider Guiding Cases as a reference, but not necessarily to follow them. Therefore, the *Detailed Implementation Rules* clarify that where the case being decided is similar to a Guiding Case in respect of both its 'Basic Facts' and 'application of law',[60] the court in making the decision shall *canzhao* the 'Essential Points' of the Guiding Case, and in such a case, shall cite the Guiding Case by its identification number and cite the 'Essential Points' as reasons rather than as a formal legal ground (in the sense of an applicable formal source of law) in its judgment. Where a litigant, their counsel, or a prosecutor cites a Guiding Case in their argument,[61] the court shall respond and explain in its legal reasoning whether it has *canzhao* the Guiding Case, and if not, why it has not done so. It thus appears that by *canzhao*, the SPC clearly intends Guiding Cases not merely to be 'referred to' or 'considered', but 'followed'. Some suggest that a court may choose not to follow a Guiding Case as long as it states its reasons for so choosing.[62] However, the better interpretation of the above SPC provisions is that a court may only decline to follow a Guiding Case where it is satisfied and explains clearly that the case at hand is not 'similar' to the former.

It is, however, unclear whether failure to *canzhao* a Guiding Case in a similar case constitutes a ground for appeal or retrial.[63] Thus, it is clear that Guiding Cases have a greater formal legal force than other cases, including Gazette Cases. Guiding Cases as redacted by the SPC appear to resemble precedents in common law jurisdictions in that they produce legal rules suitable for direct application to future adjudication. However, there is great danger in treating a Guiding Case as a 'precedent' in the common law sense. Not only can the former be barely said to be binding in the sense used in common law jurisdictions, but it also operates quite differently. To illustrate the hidden traps for the unwary and the extra care required in approaching a Guiding

59. See generally Guo Feng, 'Zhongguo fayuan zhidaoxing anli de bianxuan yu shiyong (中国法院指导性案例的编选与适用) [The Compilation and Application of China's Guiding Cases]' (Stanford Law School China Guiding Cases Project, 27 January 2017) <http://cgc.law.stanford.edu/commentaries/18-guo-feng> accessed 10 December 2018. The Guiding Cases selected are cases that convey good social values but are not necessarily cases that are legally significant, see particularly ibid, Appendix (Q&A).

60. It is not clear what 'application of law' refers to given that a Guiding Case has a 'Basic Facts' section but not one entitled 'application of law'. There is however a 'relevant legislative provisions' section.

61. This provision does not have a restricting effect and a judge has a duty to find and follow an applicable Guiding Case: Guo (n 59).

62. Guo (n 59); Yunteng Hu and SPC Guiding Case Office (eds), *Zuigao renmin fayuan zhidaoxing anli canzhao yu shiyong* (最高人民法院指导性案例参照与适用) [*Following and Applying SPC Guiding Cases*] (People's Court Press 2012) 26–27.

63. Given that the SPC explicitly stipulates that a Guiding Case should not be cited as a legal basis, is it possible to say that such a failure amounts to an 'erroneous application of law' within the meaning of Article 170 of the Civil Procedure Law (2012)? An answer in the negative was given by Judge Guo Feng (n 59) Appendix (Q&A).

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Case, we take a close look at Guiding Case No 1, *Shanghai Centaline Real Estate Consultants Co Ltd v Tao Dehua, A Dispute under a Contract of Intermediation*.[64]

Let us first examine the 'Basic Facts' given by the SPC in Guiding Case No 1. The respondent Centaline entered into a contract with the appellant Tao on 27 November 2008 pursuant to which Centaline would facilitate Tao's purchase of a unit. Under Clause 2.4 of the contract, it was agreed that where, within six months from the date when Tao inspected the property (under Centaline's arrangements), Tao or his agent, representative, or other associated individuals uses information, opportunities, or other facilities provided by Centaline to purchase the unit without the intermediation of Centaline, Tao would be liable to pay to Centaline one per cent of the actual purchase price as '*weiyue jin*' (ie, liquidated damages or 'money payable for breach of contract').[65] Prior to the inspection arranged by Centaline, the unit had been shown by two other intermediaries to Tao and his wife. The price that Centaline had asked Tao to pay to secure the unit was RMB 1.65 million, while another intermediary was able to achieve a considerably lower price of RMB 1.38 million. Tao subsequently signed a contract with the seller through the latter intermediary on 30 November 2008, duly paid that intermediary a commission of RMB 13,800, and consequently refused to pay Centaline any commission or *weiyue jin*.

Comparing the above facts with those stated in the appellate judgment of the Shanghai No 2 IPC,[66] there are two notable differences. The first difference is that under Clause 2.4, Tao was liable to pay the stipulated *weiyue jin* in the event that he or his agent, representative, or other associated individuals 'purchased the unit from the seller'. Strikingly, the IPC did not deal with this part of the clause in its judgment and the provision was subsequently omitted from the Guiding Case. The second difference is that all Centaline had done to facilitate Tao's purchase of the unit was to arrange the inspection, and Centaline did not remain in contact with Tao regarding the potential purchase after the inspection. This fact is not stated in the Guiding Case, although it was cited by Tao during the trial, and might have carried some weight in the IPC's decision.

In the actual legal proceedings, the Court at first instance held for Centaline on the ground that Tao had obtained information from Centaline, and had breached Clause 2.4 by purchasing the unit through the other intermediary. On appeal, the IPC reversed the decision holding that Clause 2.4 was legally enforceable, but it had not been breached by Tao, who was therefore not liable to pay the stipulated *weiyue jin*. In the Guiding Case, the SPC summarized the 'Essential Points' as follows:

> It is lawful and valid to agree under a contract of intermediation for the sale of properties that the purchaser is not allowed to utilise property information provided by an

64. Shanghai zhongyuan wuye guwen youxian gongsi su tao dehua jujian hetong jiufenan (上海中原物业顾问有限公司诉陶德华居间合同纠纷案) [Shanghai Centaline Real Estate Consultants Co Ltd v Tao Dehua] (2009) 沪二中民二(民)终字第1508 号 (Shanghai No 2 IPC, 4 September 2009), Guiding Case No 1, issued by the SPCJC on 20 December 2011), GSPC, 2012, Issue 2 <www.court.gov.cn/shenpan-xiangqing-4214.html> accessed 10 December 2018.

65. These facts are taken from the appellate judgment. The first instance judgment (2009) 虹民三(民)初字第912号 (Shanghai Hongkou District People's Court, 23 June 2009) could not be found.

66. Shanghai Centaline Real Estate Consultants Co Ltd v Tao Dehua (n 64).

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> intermediary company to conclude a sales contract with the vendor bypassing the intermediary company. However, where the vendor lists a property for sale through multiple intermediary companies, and where the purchaser obtains the same property information through a proper channel available to the rest of the public, the purchaser is entitled to choose an intermediary company who asks for a lower price and provides better service to facilitate the conclusion of a contract for the sale of the property. In so doing the purchaser does not utilise property information provided by the intermediary company with whom it previously contracted, hence its conduct does not constitute a breach of contract.

What legal principle(s) or rule(s) applicable to like cases can be derived from this statement? How should this Guiding Case be followed in future cases? It seems that the distillation by the SPC of a Guiding Case from the original case and its overriding concern for producing a set of easy-to-follow rules have created huge difficulties in maintaining the internal coherence of the Guiding Case, and have presented real challenges for courts striving to achieve uniformity and consistency in future cases. A prior survey found thirty-three cases decided between 20 December 2011 and 29 January 2014 in which the cause of action arises from an contract of intermediation and contain the term 'jumping order', of which fourteen are classified as relevant to the issue dealt with in Guiding Case No 1.[67] At the time of writing, the number of cases released on the 'China Judgments Online' website falling within the above two search conditions has surged to a staggering figure of almost 250. Most of these cases were decided by Intermediate People's Courts and Basic People's Courts.[68] These cases confirm my analysis of the intricacies and subtleties associated with Guiding Cases, which will be demonstrated in two points.

First, it is questionable whether the Guiding Case properly addresses the principal legal issue arising on the facts of the case.[69] The principal issue in the case appears to be whether, and if so to what extent, a court should enforce a contractual clause designed to prohibit or deter[70] a property purchaser from striking a deal with the vendor either directly or through another intermediary at the expense of an intermediary (usually a real estate agency) retained by the purchaser. However, the SPC paid little attention to this issue in the Essential Points. The issue is significant in that it calls for a court to strike a delicate balance between two parties who are placed in a relatively weak bargaining position vis-à-vis a third party. It is important to note, by way of background, that the residential real estate market in China (at least in the bigger urban

67. Jingting Deng (n 58). A 'jumping order' refers roughly to a situation where a party who has contracted with an intermediary to purchase or sell a property enters into a contract with the property seller or purchaser without the notice or consent of the intermediary.

68. There are only three cases decided by a HPC and in two of them, the issue in Guiding Case No 1 was not raised. The other HPC decision is discussed later in this article.

69. It is unfortunate that a Guiding Case does not contain a section setting out clearly the legal issue(s) to be resolved. The IPC identified in its judgment three points of controversy: (i) the classification of the contract in question (the contract was classified as a contract of intermediation as defined under art 424 of the CCL; (ii) the legal validity and enforceability of Clause 2.4 (held to be not invalid under art 40 of the CCL); and (iii) whether Tao breached the contract with Centaline.

70. An inconsistency in this respect between the 'Basic Facts' and the 'Essential Points' should be noted. According to the former, the contractual clause provides that the purchaser shall be liable to pay *weiyue jin* upon the impugned conduct, whereas the first sentence of the latter suggests that the contract simply prohibits such conduct.

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centres) is largely a vendor's market, such that both the intermediary and the purchaser are 'weaker' parties when bargaining with the vendor. In this context, the court ought to have an appropriately balanced interpretation of Articles 40 (invalid standard-form contract terms), 54(2) (manifestly unfair contracts), and 114 (judicial adjustment of *weiyue jin*) of the *Chinese Company Law* (CCL) and apply them to the facts of the case.

Both the 'Reasons of Adjudication' section of the Guiding Case and the appellate judgment of the IPC state that the relevant contractual clause is not invalid under Article 40 of the CCL since, as a standard-form contract term, it does not 'exclude the liability' of the intermediary or 'increase the liability or exclude the main right' of the purchaser.[71] However, the Essential Points formulated by the SPC make no reference to Article 40 of the CCL when stating that the contract clause is valid. Should this holding be interpreted restrictively as a specific reference to Article 40 of the CCL instead? Such a restrictive interpretation appears appropriate in that the Guiding Case ought not to preclude a court from invalidating or varying a like contractual clause under other provisions (such as Articles 54 and 114) of the CCL. This is so even though reference to Article 40 of the CCL is found only in the 'Reasons of Adjudication', which are strictly not binding, and in the original judgment, which is not part of the Guiding Case. Importantly, it is the application of the tests under Article 40 of the CCL in the Reasons of Adjudication that has been repeatedly quoted in later cases.[72] However, reliance on the Reasons of Adjudication is problematic, particularly where statements in the Reasons of Adjudication are not sufficiently clear, or are at variance with the original judgment, or diverge from the Essential Points.

One example is the omission from the Basic Facts of Guiding Case No 1 of a material fact in the original case, namely the provision under Clause 2.4 that Tao's liability to pay *weiyue jin* would also be triggered where Tao or his agent, representative, or other associated individuals 'purchase the unit from the vendor'. Under this provision, Centaline's entitlement to the stipulated *weiyue jin* is not dependent upon any use by Tao of information provided by Centaline. Apparently, the IPC could have decided the case in favour of Centaline on the basis of this provision alone. By omitting this provision from the 'Basic Facts' of the Guiding Case, the SPC effectively 'manufactured' a new set of facts involving a contractual clause under which the *weiyue jin* is payable only when the purchaser has utilized information or other facilities provided by the intermediary. Does this 'manufactured' Guiding Case apply to a standard-form contract of intermediation which provides, as is commonly the case in practice, that *weiyue jin* is payable wherever a sale is concluded? Of immediate interest here is the validity of such a contractual provision. Should a court follow the first sentence of the Essential Points and hold that the provision is valid?

71. See also Guiding Case Office of the SPC (drafted by Liu Jing), 'Zhidao anli yihao "shanghai zhongyuan wuye guwen youxian gongsi su tao dehua jujian hetong jiufen an" de lijie yu canzhao (指导案例1 号《上海中原物业顾问有限公司诉陶德华居间合同纠纷案》的理解与参照) [Understanding and Following Guiding Case No 1, People's Judicature (Application)]' [2012] No 7 Renmin Sifa – Yingyong (人民司法 – 应用) [People's Judicature – Application] 31.

72. See eg Sanming shi meilie qu chenggong fangdichan jingji youxian gongsi yu chen hong jujian hetong jiufen yishen mingshi panjue shu (三明市梅列区诚功房地产经纪有限公司与陈鸿居间合同纠纷一审民事判决书) [Chenggong Real Estate Agency Co Ltd v Chen Hong] (2014) 梅民初字第 3057 号 (Meilie District People's Court, 29 January 2015).

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In practice, some courts explicitly reasoned that such a provision was manifestly invalid under Article 40 of the CCL, despite the fact that bold letters and underlines were used when drafting the clause.[73] However, other courts have held the provision to be valid and this holding appears to have been influenced by Guiding Case No 1 (particularly its Reasons of Adjudication, which refer to Article 40 of the CCL).[74] This latter approach represents a mechanical application of the first sentence of the Essential Points of the Guiding Case, but it also illustrates how putting a blue pencil through (ie, deleting parts of) the original case without regard for its factual context might distort the application of law in future cases.[75]

Further, the failure to identify and focus on the issue of validity meant that the applicable legislative provision was wrongly identified. The Guiding Case cites Article 424 of the CCL as a legal ground for the decision. Yet, Article 424 provides a definition of a contract of intermediation and does not resolve the dispute in the case. Instead, Article 40, which is discussed in the Reasons of Adjudication, should be cited as the applicable legal rule. More importantly, a *weiyue jin* clause like the one in the Guiding Case is also governed by Article 114 of the CCL, which empowers a court to, inter alia, reduce the amount of the stipulated *weiyue jin* where it is 'excessively higher than the actual loss incurred'. It is thus surprising that both the IPC and the SPC ignored this important mechanism that was designed to re-balance the interests of contracting parties in a case precisely like this. Unfortunately, this means that Guiding Case No 1 does not lay down any rule about how Article 114 is to be applied to a *weiyue jin* clause, and therefore cannot provide any guidance on the power of a court to fix a reasonable amount of *weiyue jin* where the purchaser is found liable in breach.[76]

Second, similar difficulties arise when we turn to the 'Essential Points'. The Essential Points appear to focus on the issue of what constitutes the impugned conduct. However, the real issue in the case is how Clause 2.4 should be construed – specifically, what amounts to 'utilising information, opportunity or other facilities provided by Centaline' under that clause. Having concluded that a clause 'prohibiting' the stipulated conduct is lawful and valid, the Essential Points do not proceed to ascertain the meaning to be attributed to that clause. Neither the adjudicating

73. Jinan zhonghe fangdichan jingji youxian gongsi yu liuzhen zujian hetong jiufen shangsuan (济南中合房地产经纪有限公司与刘珍居间合同纠纷上诉案) [Jinan Zhonghe Real Estate Agency Co Ltd v Liu Zhen], (2017) 鲁01民终1747号 (Shandong Jinan IPC, 3 May 2017) (the Court then applied the utilization of information test after holding the contractual clause to be invalid). See also Wuhan jiahong ju fangdichan guwen youxian hongsi su luo xianjun jujian hetong jiufen an (武汉嘉鸿居房地产顾问有限公司诉罗贤军居间合同纠纷案) [Wuhan Jiahong Real Estate Consultancy Co Ltd v Luo Xianjun] (2015) 鄂洪山和民商初字第00473号 (Wuhan Hongshan District People's Court, 24 July 2017).

74. See eg Xian mo fangchan xingxi zixun youxian gongsi yu lu momo jujian hetong jiufen an (西安某房产信息咨询有限公司与卢某某居间合同纠纷案) [A Xi'an Property Information Consultancy Co Ltd v Lu] (2014) 西中民一终字第 00498号 (Shanxi Xi'an IPC, 27 June 2014).

75. The same can be said of a number of court decisions which defied the view expressed by the Guiding Case Office of the SPC (n 71) by holding that a contractual clause prohibiting a purchaser from dealing with the vendor or other intermediaries once the purchaser has attended an inspection arranged by the contracting intermediary was valid and enforceable: see Deng (n 58) 147.

76. See eg A Xi'an Property Property Information Consultancy Co Ltd v Lu (n 74).

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court nor the SPC made any attempt to construe the clause based on the parties' actual or presumed intention. No mention was made of an applicable legislative provision, namely Article 41 of the CCL, which provides for the construction of a standard-form contract clause pursuant to the principle of *contra proferentem*. In a subsequent case, the Court had to interpret a clause which provided that the purchaser was liable to pay double the agreed commission where he struck a deal with the vendor 'in private under any circumstance' within one year after signing the contract of intermediation. The Court was of the view that the clause was 'too harsh'. Yet, instead of invalidating it, the Court construed the quoted words restrictively to mean 'in private by utilizing the information provided by the intermediary'.[77] To add a qualifying condition of 'utilizing information' to the plainly unqualified text of the contractual clause creates its own problems. However, at least, the approach adopted in the subsequent case points to a possible solution to the 'jumping order' problem, a solution of which Guiding Case No 1 ought to, but does not, avail itself.

In practice, it may be extremely difficult for a court to determine whether the purchaser has actually utilized information or other facilities provided by an intermediary in contracting with the vendor. The Essential Points state, in effect, that where the same property is listed by more than one intermediary and information about the property is duly accessible to the public, a purchaser is deemed not to have utilized information provided by one intermediary when it chooses to buy through another intermediary who offers a better price and service.[78] However, there are a number of challenges facing a court applying this proposition to the facts of a particular case. First, the Essential Points refer only to 'information', whereas the Reasons of Adjudication opt for the full version of the phrase comprising 'opportunity and other facilities'.[79] This creates uncertainty as to whether the rule laid down in the Essential Points is applicable by analogy to a future case under which something more than mere information is involved. The Guiding Case attaches no importance to the fact that Centaline did nothing to facilitate the sale other than arranging a single inspection of the unit. How significant is this fact in the application of the above proposition? It is reasonable to suspect that the proposition stated above should have no application where the outflanked intermediary has provided substantial facilitative services such as negotiating the price and communicating inquiries and replies between the parties.

Second, all evidence seems to suggest that in formulating the 'Essential Points', the SPC probably confused the issue of contractual interpretation with another issue, namely the default rule to be applied to determine whether the purchaser's conduct constitutes a breach of contract. Instead of confining itself to a determination of

77. Pingdu shi baishun fangwu jingyingbu yu wang jugang jujian hetong jiufen yishen mingshi panjue (平度市百顺房屋经营部与王玉刚居间合同纠纷一审民事判决) [Pingdu City Baishun Properties Operation Division v Wang Yugang] (2015) 平商初字第 2460号 (Shandong Pingdu City People's Court, 31 October 2015). The original text is '无论以任何条件私下成交', which might well be understood to mean 'strike a deal in private on any conditions'. The translation given in the main text reflects the Court's actual interpretation. In this context, 'in private' refers to 'without the intermediation of the plaintiff real estate agent'.

78. See Guiding Case No 1: Shanghai Centaline v Tao Dehua (n 64).

79. ibid.

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what amounted to 'utilization of information' as prescribed by the parties under the contract, the SPC elevated 'utilization of information' into a default rule that should be applied even where the contract was silent on the matter. Resort to notions extraneous to the contractual clause, such as deliberateness or bad faith, to describe the colourful metaphor of 'jumping order' suggests that a default rule was in play.[80] This confusion has caused widespread consequences for subsequent cases, as the 'utilization of information' test has often been applied to cases where expressions of a similar effect are not found in the contract.[81]

Third, the determination of whether a purchaser has utilized information provided by an intermediary hinges very much on which party bears the burden of proof. Whichever party bears this evidential burden has to overcome substantial challenges. It is thus surprising that the SPC did not deal with this crucial matter in any detail, or indeed at all in the Guiding Case. It has been suggested that neither the trial court in the original case (the Shanghai No 2 IPC) nor the SPC favoured approaching the case on the basis of allocating the burden of proof one way or the other.[82] The implication seems to be that neither party should lose its case simply because it failed to prove or disprove that Tao had used information provided by Centaline and that the Court should make a finding on the basis of all available evidence accepted by the Court. However, courts in later cases have given more weight to the issue of the burden of proof even though differing opinions have been expressed on both the allocation and extent of the parties' evidential burdens.[83]

Fourth, in Guiding Case No 1, while the intermediary through which Tao purchased the unit evidently obtained a lower price than Centaline did, it is not clear whether the intermediary had also provided better service. In any event, there is nothing in the Guiding Case that suggests that if a purchaser has not obtained a lower

80. See the 'Reasons of Adjudication' section in Guiding Case No 1: Shanghai Centaline v Tao Dehua (n 64). See also Guiding Case Office of the SPC (n 71) 30. See also the original IPC judgment in Shanghai Centaline Real Estate Consultants Co Ltd v Tao Dehua (n 64) (a purchaser's 'unfair conduct with a view to evading his contractual liability to pay commission', 'withholding from concluding a contract through the outflanked intermediary', dealing with the vendor 'in secrecy', etc).

81. As noted earlier, standard-form clauses used in practice do not normally contain the words 'utilize information or other facilities'. Resort to the test in many cases can be understood as an application of the principle of good faith: Deng (n 58) 151. However, the use of identical wording and formulation in these cases indicates that they have clearly been influenced by Guiding Case No 1 (n 64).

82. Yunteng Hu and SPC Guiding Case Office (n 62) 30.

83. See eg Chengdu shangdongji qiye guanli youxian gongsi yu song lijun jujian hetong jiufen zaishenan (成都上东吉企业管理有限公司与宋丽军居间合同纠纷再审案) [Chengdu Shangdongji Enterprise Management Co Ltd v Song Lijun] (2017) 川民申1707号 (Sichuan HPC, 28 June 2017) (the onus is on the plaintiff intermediary to prove that the defendant vendor had committed a 'jumping order' in breach of contract and the mere fact that the plaintiff was engaged later than the other intermediary and only three days before the conclusion of the sale did not show a 'high possibility' that the breach had occurred). cf Nanjing lianjia fangdichan jingji youxian gongsi yu wuping, zhu dandan jujian hetong jiufenan (南京链家房地产经纪有限公司与吴萍、朱丹丹居间合同纠纷案) [Nanjing Lianjia Real Estate Agency Co Ltd v Wu Ping and Zhu Dandan] (2015) 宁民终字第3770号 (Nanjing IPC, 11 September 2015) (holding the purchaser liable for buying property through another intermediary on the second day after signing the contract of intermediation with the plaintiff intermediary, failing to prove that the other intermediary had provided any services in that one-day window or that she had compared the prices and services offered by the two intermediaries).

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price or better service by resorting to 'jumping order', the purchaser will be deemed to have used information provided by the outflanked intermediary.

It should be clear from the above that a Guiding Case is not intended to be, and should not be regarded as, something akin to a precedent in the common law jurisdictions. In essence, a Guiding Case is not a 'case' at all. At its core are 'Essential Points of Adjudication', which comprise a set of rules stripped of their factual context. In this respect, a Guiding Case resembles a provision in a Judicial Interpretation, since both embody abstract rules supposedly derived from judicial practice, except that the Guiding Case contains a separate section 'Basic Facts'.[84] However, the 'Basic Facts' section does not have legally binding effect. The facts are given not as a source from which the rules originate, but as an 'illustration' of how the rules can be applied to an actual scenario. The rules under the 'Essential Points' section are formulated in such a way as to lend themselves to easy comprehension and application by lower courts. As a result, the SPC often has to heavily edit and simplify the original case, or even 'manufacture' a new factual matrix to suit the rules formulated. The detachment from the factual context of the original case deprives a Guiding Case of the essential character of case law.

It is therefore suggested that the issuance of a Guiding Case marks only the beginning of a process of case law-making. A Guiding Case starts by laying down basic rules, and future cases develop those rules based on their own facts within the boundaries of the broad principle or 'spirit' expressed by the Guiding Case.[85] In a case discussed above, a local court announced that:

> although Guiding Cases issued by the SPC have general guiding significance to basic-level courts, a system of precedents is not in place in our country, so judges at basic-level courts are entitled to make a decision in concrete cases drawing distinctions between different facts, provided that the broad principle of Guiding Cases is followed.

The Court went on to list four factual points in the case that diverge from the Basic Facts of Guiding Case No 1.[86] It is of course rather presumptuous for the Court to

84. As a form of 'concrete judicial interpretation' as opposed to the normal 'abstract judicial interpretation': Kui Shen, "Democratization" of Judicial Interpretation and the Supreme Court's Political Function, (2008) 29(4) Social Sciences in China 33, 35 fn 3. See also Kui Chen, 'How to Apply the Guiding Cases of the Supreme People's Court in Judicial Practice' (Stanford Law School China Guiding Cases Project, 22 April 2012) <https://cgc.law.stanford.edu/commentaries/3-judge-chen> accessed 10 December 2018.

85. The SPC requires all lower courts to 'accurately grasp the guiding spirit' of the Guiding Cases and to understand their 'spirit and substance': Zuigao renmin fayuan guanyu fabu diyipi zhidaoxing anli de tongzhi (最高人民法院关于发布第一批指导性案例的通知) [SPC Notice on the Issue of the First Batch of Guiding Cases], (SPC 法 [2011] 354号, issued on 20 December 2011).

86. Pingdu City Baishun Properties v Wang Yugang (n 77). The four factual points are: (i) the plaintiff intermediary provided information and service to the purchaser before the second intermediary (through which the purchaser bought the property) did; (ii) the purchaser used information provided by the plaintiff at least for the purpose of comparing prices; (iii) even the single inspection arranged by the plaintiff involved the provision of service and labour; and (iv) in practice, some purchasers did engage in malicious 'jumping order(s)'. In my view, the last point appears to be policy-related instead of factual, and none of these points appear to distinguish the case from Guiding Case No 1. Nevertheless, it was held that the purchaser was liable to pay a reduced amount of RMB 2,000 (as opposed to the claimed commission of RMB 8,600) as *weiyue jin*. Note that the SPC did not consider fact no 1 to be conclusive: Yunteng Hu and SPC Guiding Case Office (n 62) 30.

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state that Guiding Cases have no binding force but only 'general guiding significance'. However, if the approach adopted by the Court is understood correctly, it appears that the broad principle or rule established by a Guiding Case should be followed, but it is open for particularization and refinement in its application to the facts of a future case. In this way, the Basic Facts of the Guiding Case or even the facts of the original case may be reintroduced into the continuing development of case law, a process that involves not merely drawing distinctions between separate sets of facts, but also filling gaps and fixing defects in the Guiding Case. For example, some judges in the lower courts have extended Guiding Case No 1 by drawing a distinction between buying through a friend and buying through a professional intermediary.[87] If sound case law jurisprudence and methodologies are to be developed from the Guiding Case system at all, this must be by way of a joint enterprise in which the work of the SPC is necessary but hardly sufficient, and where contributions from all other courts and legal academia are essential.

IV. CONCLUSION

When studying Chinese law, it is insufficient for a comparatist to look solely to abstractly formulated legal rules in legislation, regulations, or even judicial interpretations issued by the SPC for a solution to a practical problem. Chinese court cases emerge as a vitally important source of such legal solutions. In particular, Guiding Cases issued by the SPC have some formal legal effect, as a court in a future similar case is required to *canzhao* the 'Essential Points' in a relevant Guiding Case. However, it would be misleading to liken Guiding Cases to precedents in common law jurisdictions and to speak of 'precedents' in the Chinese context. As we have seen, Guiding Cases operate in a way that is rather distinct from how we understand case law normally operates. Despite the appearance of simplicity, a Guiding Case may be evidence of a law-making model of great complexity. Another complex issue concerns whether and how much weight should be given to other court cases in China. This question should be answered based on the facts of each individual case rather than preliminary assumptions. For instance, Gazette Cases do not in themselves generate binding force and their legal effect may hinge on both legal and non-legal considerations. This complexity is distinct from the sophistication of the law and often arises from the abstractness, ambiguity, and mutability embedded in the Chinese legal system. Nevertheless, it is sometimes necessary to accept this complexity as part and parcel of the functioning of Chinese law. In this sense, a comparatist cannot afford simply to assume the role of an objective external observer; they must strive to be (and not merely stand in the shoes of) an internal legal actor who joins an ongoing process of developing the jurisprudence and methodologies of Chinese case law by reducing distinct cases into a systematic whole.

87. Zelin Ou, 'Discussing the Guiding Case System with Chinese Characteristics by First Combining Guiding Case No. 1 with Adjudication Practices' (Stanford Law School China Guiding Cases Project, 2 May 2012) <https://cgc.law.stanford.edu/commentary/4-judge-ou> accessed 10 December 2018.

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